1961

James N. Thomas, and Kathleen Mcmurtrey Thomas v. The Children's Aid Society, of Ogden, A Corporation : Brief of Appellants

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

JAMES N. THOMAS, and KATHLEEN McMURTREY THOMAS,

Appellants,

vs.

THE CHILDREN'S AID SOCIETY, of Ogden, a Corporation,

Respondent.

APPELLANT'S BR

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THE CHILDREN'S AID SOCIETY, of Ogden, a Corporation,
Respondent.

Case No. 9419

APPELLANT'S BRIEF

STATEMENT

This is a Habeas Corpus proceeding commenced in the District Court of Weber County to regain custody of the infant child of Appellants. The pertinent facts are set forth in the pleadings R. 54, 64, 136 and the testimony, R. 182, 183 and 226. The testimony is voluminous, accumulative, and, in many instances irrelevant and immaterial, yet we respectfully suggest that if this Court will read the entire record, it will appear that the only real issue in this case is the Race question. The conclusion is inescapable that if the Appellants in this case had been both of the same race,

this case would never have reached the courts.

The trial was continued several times at the request of Respondent for the purpose of securing witnesses on its behalf, which motions were granted by the Court over the objections of Appellants (R. 90, 91, 98, 101, 116).

Respondent took the depositions of Calvin and Mary McMurtrey (R. 180), but the McMurtreys appeared in person at the trial (R. 226, page 3), and for this reason their depositions were not published or offered in evidence. Notwithstanding this fact, the seal on this deposition has been broken and opened without authority of Law and in violation of Rule 30(b).

The nature of this case makes one wonder how such flagrant irregularity can happen in a court of Justice.

After trial, Judgment was entered awarding custody of the child to the Respondent (R. 168).

The Appellants filed their motion for a new trial (R. 153), which motion was denied (R. 171), from which the Appellants prosecute this Appeal and assign the following:

ERRORS

1. Error of the Court in continuing the trial from September 14, 1960 to December 7, 1960, without a showing of due diligence as provided by Law.

2. Error of the Court in not finding on all the issues as presented by the pleadings and the evidence.

3. Error of the Court in holding that the child is illegitimate.

4. Error of the Court in holding that the marriage of the Appellants is void under Section 30-1-2 (5), Utah Code 1953.

5. Error of the Court in finding that the release executed by the mother was not obtained by duress, undue influence or coercion.

6. Error of the Court in denying Appellants' Motion for a New Trial.

7. The Judgment is contrary to the evidence.

8. The Judgment is contrary to Law.

To sustain this Appeal the Appellants rely on the following:

POINT I

THE COURT ABUSED ITS DISCRETION IN GRANTING DEFENDANT A CONTINUANCE FROM SEPTEMBER 14, 1960.

POINT II

THE FATHER OF AN ILLEGITIMATE CHILD IS ENTITLED TO ITS CUSTODY.

POINT III

SECTION 78-30-4, UTAH CODE 1953, IS UNCONSTITUTIONAL AND VOID AS APPLIED TO APPELLANT, JAMES N. THOMAS.

POINT IV

FAILURE OF THE TRIAL COURT TO FIND ON ALL ISSUES OF FACT PRESENTED BY THE PLEADINGS AND EVIDENCE IS REVERSIBLE ERROR.

POINT V

THE CHILD, IN THIS CASE, IS A LEGITIMATE CHILD.

POINT VI

THE MERE SIGNING OF AN INSTRUMENT AND HANDING IT TO AN OFFICER AUTHORIZED TO TAKE ACKNOWLEDGMENTS DOES NOT CONSTITUTE AN ACKNOWLEDGMENT AS REQUIRED BY LAW.

POINT VII

SECTION 30-1-2(5) UTAH CODE 1953 IS UNCONSTITUTIONAL AND VOID.

ARGUMENT

We contended at the trial that the mother was coerced into giving her child away. We do not waive that issue, but to brief it here would unduly prolong this brief.

See, *Trigg* vs. *Trigg*, 22 P. 2nd 119, *Gardenas* vs *Ortiz*, 226 P. 418.

POINT I

THE COURT ABUSED ITS DISCRETION IN GRANTING DEFENDANT A CONTINUANCE FROM SEPTEMBER 14, 1960.

R. 91, 98, 116,
Rule 40(b) Utah Code,
Neven vs. *Neven*, 154 P. 78,
State vs. *Mathis*, 319 P. 2nd 134.

This case was originally set for trial for August 17, 1960 at 11:00 o'clock A. M. (R. 89).

On August 17, the Appellants appeared in person and with their counsel ready for trial, at which time the Respondent through its counsel, requested a continuance to August 31, 1960 (R. 91), but this continuance had already been granted the day before (R. 90).

On August 24, the Respondent appeared in Court ex parte and obtained a continuance from August 31 to September 14 (R. 101).

On August 24, the Appellants appeared in Court and moved the Court for an Order denying Respondent's request for a continuance (R. 107).

On September 14, the Court made and entered its Order vacating the trial date of September 14 (R. 116).

This Order states that it was vacated upon the request and stipulation of counsel, which is erroneous in that it was granted over the objections and protest of the Appellants (R. 110, 111).

At R. 108, Paragraph 4, it was pointed out to the Court at that time that there was no assurance made to the Court that Spencer B. Wheatley would appear for trial on September 14, 1960.

Rule 40(b) of the Utah Code provides, among other things:

> "If the motion is made upon the grounds of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and SHALL SHOW DUE DILIGENCE HAS BEEN USED TO PROCURE IT."

The Record shows that from the inception of this case the witness whose evidence was being sought was

known to the Respondent and that the Respondent also knew that said witness was a resident of the State of Idaho and could not be compelled to attend trial in the State of Utah, and for this reason it is the position of Appellants that it was gross negligence on the part of the Respondent in not taking the deposition of said witness in due season.

Rule 40(b) cited above, expressly provides that the Court may, in its discretion, grant a continuance provided due diligence is shown in trying to obtain such evidence. Under this Rule there is no discretion granted in the absence of a showing of due diligence.

Neven vs. *Neven* is a Nevada case wherein the Supreme Court of Nevada said:

> "A party who is a material witness in his own behalf must have his testimony ready for use at the trial unless prevented from doing so by some obstacle which by the exercise of reasonable diligence he cannot overcome, and the obstacle should not be one which he has created by his own voluntary act. If he allows consideration of business or pleasure or even regard his own health to call him away for a time when his suit is liable to be called for trial and thereby loses the benefit of his own testimony he must suffer the consequences. A party must be held to the exercise of good faith and diligence and cannot be heard to complain if the failure to present his case results from an attempt to subordinate the business of the Court to his own business engagements and convenience."

State vs. *Mathis* is a Utah case where the right to a continuance is discussed and the authorities analyzed and, even though the continuance there complained of was upheld, one concurring Justice questioned the validity of the decision and one Justice wrote a strong and forceful dissenting opinion and in this we respectfully submit to this Court that the authority of the trial court to grant a continuance should be resricted to those cases where there is a showing of diligence as provided by the statute. The publication and reception of this deposition in evidence was duly objected to at the trial R., 226, Page 92.

POINT II

THE FATHER OF AN ILLEGITIMATE CHILD IS ENTITLED TO ITS CUSTODY.

55-10-32, U. C. 1953,
55-10-6, U. C. 1953,
55-10-19, U. C. 1953,
77-4-10, U. C. 1953,
77-60-12, U. C. 1953,
10 C. J. S. 83,
Utah Fuel Co. vs. *Ind. Comm.*, 234 P. 697,
Re a Minor, 155 F. 2nd 870,
Gen. 1:28.

The Court found, and we assume, for the sake of this point, that the child is illegitimate.

On the Sixth day of Creation, God made Man, in His own image, and directed him as follows:

> "Be fruitful, and multiply, and replenish the Earth . . ." Gen. 1:28.

At that time there was no law upon the subject of marriage and from that day forward, men have been begetting children by their wives, their concubines, their maid-servants, and the harlots in the streets, but, in all instances and on all occasions, the fathers have been required to, and did, support and provide for their offspring, with few exceptions under the Common Law.

Today, in Utah, the father of an illegitimate child is required by statute to support such child.

Section 55-10-19 provides, among other things:

> "* * * the Court shall adjudge that he pay to the Court a sum of money not exceeding two-hundred dollars ($200) for the first year after the birth of such child and a sum not exceeding one-hundred-fifty dollars ($150) yearly for seventeen years succeeding said first year for the support and maintenance and education of such child."

Section 55-10-32 provides:

> "No child as defined in this Chapter shall be taken from the custody of its parents . . . without the consent of such parents."

Section 55-10-6 defines parent:

> " 'Parent', when used in relation to a child, shall include guardian and every person who is by Law liable to maintain a child."

and child:

> "The word 'child' means a person less than eighteen (18) years of age."

Section 77-60-12 provides:

> "The father of such child shall not have the right to its custody or control, if the mother is living and wishes to retain such custody and control, until after it shall have arrived at the age of ten years unless upon petition of the District Court of the county in which the mother resides, it shall upon full hearing after notice to the mother, be made to appear that the mother is not a suitable person to have the custody and control of said child."

Under the title, "Bastards", 10 C. J. S. 83, it is said:

> "While it has been stated broadly that the putative father of a bastard or illegitimate child has no parental power or authority over such child, and that the father is not entitled to the custody and services of the child, in the absence of statute or contract giving him the right to custody and imposing on him the duty to support and there are expressions to the effect that the father is not entitled to the custody in the absence of a correlative duty to support the

child, it has been held or recognized that the putative father is in general entitled to custody against all but the mother."

Section 77-4-10 provides:

"Every illegitimate child is an heir of the person who acknowledged himself to be the father of such child, and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. The issue of all marriages null in law, or dissolved by divorce, are legitimate."

In the case of *Utah Fuel Company* vs. *Industrial Commission*, supra, this statute was construed as follows:

"In view, therefore, that under our statute . . . the marriage of applicant to the deceased was null and void under our statute . . . the applicant could not be awarded compensation under the Industrial Act. Keeping in mind, however, all of the provisions of our statute, we are forced to the conclusion that it was the intention of the Legislature of this state to declare all of those children that are the fruit of marriages that are void under our statute . . . as legitimate and entitled to all the benefits of children born in lawful wedlock . . . The law is humane and appeals to every man's sense of justice and fairness. Why should a child which is the fruit of a void marriage be punished for the wrongful act of its parents? If any punishment is to be inflicted, let it fall upon those

> who are the actors in the drama and not upon the innocent and helpless. Moreover, society is benefitted by every humane and just law, while it is injured by every law that inflicts injustice upon even the humblest member of society. It is just as important that children born of such marriages be protected as it is that other children are. The conclusion of the Commission awarding compensation to the beneficiary is therefore not vulnerable to the objection raised by plaintiff."

Utah statutes expressly provide for the support of an illegitimate child by its reputed father and gives him the right to its custody against all the world except the mother. There are certain provisions of the statute which authorizes the taking of children from the custody of both of the parents under certain conditions, none of which are involved in this case.

A case in point under statutes similar to those cited above is *In re Minor*, supra, in which the Court of Appeals for the District of Columbia said:

> "We hold that it was error for the court to enter the decree of adoption when the interests of this father were not fully before the court for consideration, his name and location being known, and he having been afforded no opportunity to present to the court an acknowledgment of the adoptee. If, being afforded that opportunity, he failed to acknowledge the child, his consent is not necessary under the statute. If he does acknowledge it, his consent is necessary, in view of what we have to say concerning

his contribution in the support of the adoptee."

At the trial in the Court below, and upon Appellants' Motion for a New Trial, counsel for Respondent argued that the father of an illegitimate child has no rights to its custody and relied upon Section 78-30-4, which authorizes the mother of an illegitimate child to give it away for adoption.

POINT III

SECTION 78-30-4, UTAH CODE 1953, IS UNCONSTITUTIONAL AND VOID AS APPLIED TO APPELLANT, JAMES N. THOMAS.

Mills vs. *Brown*, 88 P. 609,

Reyne vs. *Trade Comm.*, 192 P. 2nd 563,

Union Trust vs. *Simmons*, 211 P. 2nd 190,

Hurwitz vs. *North*, 264 S. W. 678,

16 C. J. S. 566, and cases there cited, 78-30-4, U. C. 1953.

Section 78-30-4 provides, among other things:

> "A legitimate child cannot be adopted without the consent of its parents, if living, *nor an illegitimate child without the consent of its mother*, if living, *except* that consent is not necessary from a father or mother *who has been judicially deprived of the custody of the child*

on account of cruelty, neglect, or desertion."

Under this provision of the statute counsel contended, and the Court held, that the consent of the father was not necessary, (R. 165, Paragraph 3).

It is the position of Appellants that if such a construction can be placed upon this statute, then that statute is unconstitutional and void in that it authorizes a private individual to deprive another individual of his natural, statutory, and constitutional rights without a hearing of any kind.

In this case the father had not been deprived of the custody of his child on account of cruelty, neglect, or desertion, or otherwise determined to be an unfit father to have the custody of his child.

Under the title, "Constitutional Law", 16 C. J. S. cited above, it is said at page 566:

> "Inasmuch as the power to legislate is by nature non-delegatable, a fortiori, it may not be delegated to a private person or persons."

This doctrine seems to be supported by the overwhelming weight of authority.

The power of the Legislature to delegate its power was discussed at length, by this Court, in the case of *Mill* vs. *Brown*, supra, in which the custody of a child was directly involved. The question pre-

sented involved the power of the Legislature to provide for the commitment of a child to the Industrial School without giving its parents an opportunity to be heard.

In holding Section 7 of Chapter 117, Laws of Utah, 1905 unconstitutional and void, this Court said:

> "As we have already pointed out, the proceedings of the juvenile court do not fall, nor are they intended to come, within what is termed criminal procedure, nor are the acts therein mentioned, as applied to children, crimes. To constitute the acts under Section 7 of an adult a crime, entitles such adult to the right of a trial as for any other crime. This right is denied by said Section 7 and it cannot, therefore, be upheld. Quite true, some method is necessary to punish adults when interfering with children who may be held to be wards of the state, and no doubt it is proper for the Legislature to provide for their punishment. When such is done, however, trial must be provided for in the proper forum and legal manner. Section 7 of the act, for the reason that it violates this elementary provision, so to speak, of criminal law and procedure, must, therefore, be held of no force or effect."

After analyzing further authorities, the Court continued:

> "But there is another reason for which we think the judgment cannot be permitted to

> stand. By a careful examination of the cases above cited, it will be found that all the decisions rest upon the proposition that the state in its sovereign power has the right, when necessary, to substitute itself as guardian of the person of the child for that of the parent or other legal guardian, and thus to educate and save the child from a criminal career; that it is the welfare of the child that moves the state to act, and not to inflict punishment or to mete out retributive justice for any offense committed or threatened. In other words, to do that which it is the duty of the father or guardian to do, and which the law assumes he will do by reason of the love and affection he holds for his offspring and out of regard for the child's future welfare. The duty thus rests upon the father first, so it must likewise logically follow that he must be given the first right to discharge that duty."

Reyne vs. *Trade Commission*, is a Utah case wherein this Court held a statute unconstitutional which granted power to the Executive Board of the Barbers' Union to compel all barbers to close their shops at a certain time and charge a certain fee for their services, by saying, at page 568:

> "Sections 2, 3, and 4 of the act are unconstitutional as an improper delegation of authority."

The right of a man to enjoy the comfort, pleasure and companionship of his children is a fundamental and natural right which is protected by both state and federal, constitutions.

In *Hurwitz* vs. *North*, supra, the Supreme Court of Missouri said:

> "Due process does not always mean a court hearing, but there must be a hearing after due notice, and an opportunity to defend the right involved before a legally constituted body for determining such a right of the citizen."

In speaking of illegitimate children, Sec. 78-30-4 says:

> "* * * except that consent from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect, or desertion, is not necessary * * *."

In its first breath the legislature says that the consent of the mother is necessary, if she is living, but is silent as to the father, which implies that his consent is not necessary. In its second breath it says that the consent of a father is not necessary *if he has been judicially deprived of custody*, etc. which implies that his consent is necessary.

We have pointed out herein, wherein the Legislature may not directly delegate power to an individual to deprive another individual of his rights—query—May the Legislature, by implication, delegate such power? These two provisions of the act, being inconsistent and irreconcilable with each other, the latter should prevail and the former held void.

The unconstitutionality of Section 78-30-4 was called to the attention of the Court in Appellants' Motion for a New Trial (R. 153), and the same was denied by the Court (R. 171).

POINT IV

FAILURE OF THE TRIAL COURT TO FIND ON ALL ISSUES OF FACT PRESENTED BY THE PLEADINGS AND EVIDENCE IS REVERSIBLE ERROR.

30-1-3, 4, U. C. 1953,

U. R. C. P. Rule 52,

Gaddis Investment Co. vs. *Morrison*, 278 P. 2nd 284,

Cases there cited.

Respondent alleged that Appellants' marriage is void by reason of a former marriage (R. 66, Paragraph 4). Appellants alleged that their marriage was entered into, in good faith, thinking that JAMES' first wife had divorced him (R. 68, Paragraph 4). Respondent alleged that the marriage was void because prohibited by Utah miscegenation statutes (R. 66, Paragraph 4). Appellants testified that their marriage took place in Idaho and that they returned to Utah only for the purpose of securing custody of their child and to pay a few debts (R. 182, page 74). On both of these issues there is no conflict in the evidence, but the Court made no finding on either issue.

In the *Morrison* case, this Court, following a long line of previous decisions, said:

> "It appears that the judgment was based principally upon the findings that the contract was entered into and the commission had not been paid, totally disregarding defendant's answer to the complaint. It has been frequently held that the failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial."

Section 30-1-3 provides that when a marriage is contracted in good faith, thinking a former spouse has obtained a divorce, the children of such marriage are legitimate, thus it was a very material issue in this case, whether or not JAMES, in good faith, thought he was divorced.

Section 30-1-4 provides that marriages contracted in another country or state are valid here. This Court has held that marriages are not valid where the parties go elsewhere for the purpose of evading the laws of this state and return here to live. The pleadings and evidence show that the marriage in question was contracted in Idaho, thus it was a material issue as to whether or not Appellants returned to Utah to make it their home; the Court made no findings on either of these issues and thereby committed reversible error.

POINT V

THE CHILD, IN THIS CASE, IS A LEGITIMATE CHILD.

30-1-3, U. C. 1953,

30-1-4, U. C. 1953,

77-60-14, U. C. 1953,

78-30-12, U. C. 1953,

Harrison vs. *Harker,* 142 P. 716,

Utah Fuel Co. vs. *Ind. Comm.,* 234 P. 697,

Ex Parte Hart, 130 P. 704.

Section 30-1-3 provides:

> "When a marriage is contracted in good faith and in the belief of the parties that a former husband or wife, then living and not legally divorced, is dead or legally divorced, the issue of such marriage born or begotten before notice of the mistake shall be the legitimate issue of both parties."

Section 30-1-4 provides:

> "Marriages solemnized in any other country, state or territory if valid where solemnized are valid here."

Section 77-60-14 provides:

> "If the mother of any such child and the

> father shall at any time after its birth intermarry, the child shall and in all respects be deemed legitimate."

Section 78-30-12 provides:

> "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth."

Under Point II we pointed out the failure of the Court to make findings on the issues as to whether or not the marriage of Appellants was contracted in good faith and whether or not they returned to Utah to live. Those two issues were material issues in this case, under the above cited statutes.

Harrison VS. *Harker* deals specifically with Section 78-30-12, in which this Court said:

> "It is urged that the father . . . has none.
>
> This on the ground that a father has no right to the custody of a child born out of wedlock.
>
> . . . But I am satisfied the marriage, and the father by his petition publicly acknowledging the child to be his, and seeking its custody as his own, legitimated it. What more public acknowledgment could be made than was made

by the father—an acknowledgment of record binding on him for all time?"

In *Fuel Co.* vs. *Ind. Comm.*, this Court held that even though the marriage was void in law, the offspring of such marriage is legitimate and entitled to inherit from its father, saying, at page 699:

> "Keeping in mind, however, all of the provisions of our statute, we are forced to the conclusion that it was the intention of the Legislature of this state to declare all of those children that are the fruit of marriages that are void under our statute (unless those mentioned in section 6430 are an exception) as legitimate and entitled to all the benefits of children born in lawful wedlock."

Ex Parte Hart is a California case wherein the father accused his wife of adultery and sought a divorce on that ground, he gave the child to the Children's Home Society for the purpose of adoption. The mother brought Habeas Corpus proceedings to recover custody of the child after it had been released for adoption, and in allowing the writ, the Supreme Court of California said:

> "The mere relinquishment by the father, without the mother joining therein, could have no effect, except where there had been a prior adjudication with reference to her adultery. Here there had been no adjudication, and at the date of the execution of the instrument the mother possessed the right to be heard and to

resist any attempt to relinquish parental control of the child to the Children's Home Society. The subsequent adjudication of her previous adultery would not have the effect to destroy that right. The child, then, was in the custody of the Children's Home Society by the sufferance of the father alone, without the mother's consent; the respondents by assuming custody under authority of the Children's Home Society, acquired no right as against the mother."

In the instant case JAMES married Anna Lou on June 3, 1956 and they separated on July 4, 1956 and never lived together again and shortly thereafter, she started proceedings to divorce him (R. 182, pages 20 to 24), and according to his undisputed testimony, JAMES thought she had divorced him. Under these circumstances it is the position of Appellants that the consent of the wife referred to in the statute is not applicable here. In other words, it was not the intent of the Legislature that a man should have the consent of an estranged ex-wife before he could adopt a child as his own. In this we respectfully submit that this child, under law, is the legitimate child of JAMES and cannot be adopted without his consent.

POINT VI

THE MERE SIGNING OF AN INSTRUMENT AND HANDING IT TO AN OFFICER AUTHORIZED TO TAKE ACKNOWLEDGMENTS DOES NOT CONSTI-

TUTE AN ACKNOWLEDGMENT AS REQUIRED BY LAW.

77-30-4, U. C. 1953,

Spangler vs. *Third District Court*, 140 P. 2nd 755,

People vs. *O'Riley*, 86 N. Y. 154,

State vs. *Finn*, 52 P. 756,

Throwbridge vs. *Bisson*, 44 N. W. 2nd 810,

Wilde vs. *Buchanan*, 303 S. W. 2nd 518,

Pardo vs. *Creamer*, 310 S. W. 2nd 218,

Bradley vs. *U. S.* 218 F. 2nd 657,

In Re Beecher, 50 F. S. 2nd 530.

The last part of Section 77-30-4 provides:

> "* * * Whenever it shall appear that the parent or parents whose consent would otherwise be required have theretofore, in writing, *acknowledged before any officer authorized to take acknowledgments*, released his or her, or their control or custody of such child to any agency licensed to receive children for placement or adoption under Chapter 3 of this Title."

The evidence shows the circumstances under which the mother signed the release, the substance of which is, after months, weeks, days, and hours of persuasion, coercion, duress, and undue influence, she

placed her signature on the instrument and Mr. Wheatley snatched it out of her hand, put it in his brief case and went away (R. 183, pages 37 to 69).

Spangler vs. *District Court*, supra, is a Utah case wherein this Court said:

> "To constitute the taking of an oath, there must be definite evidence that affiant was not only conscious that he was taking an oath, but there must be some outward act from which that consciousness can definitely be inferred, which cannot be done from the mere signature to a printed form of oath."

In *State* vs. *Finn*, the Supreme Court of Oregon said:

> "Without a direct administration of the oath, there can be no affidavit, under the statute. And, while a non-observance of the exact formula in its administration may not release the affiant of legal responsibility under it, yet, it is plain that there must be some actual and bona fide attempt at a due observance of the law's requirements to give validity to the document as an affidavit."
>
> "The defendant seeks to excuse or palliate his conduct, as it respects his certification of the alleged affidavit, by asserting that the manner in which he obtained the assent of the affiants thereto was the usual manner of administering oaths in such cases. If this is true, there is a signal vice in the practice; and as was said by

Finch, Judge *In Re Eldridge*, 82 N. Y. 161. 'It would only make our duty the more imperative that the vice may be eradicated.' "

We contend that it was the intention of the Legislature, by requiring that the signature to be acknowledged before an officer authorized by law to take acknowledgments, was to require and does require more solemnity than a mere informal admission that one owes a debt. If the Legislature had intended such informal acknowledgment, it would not have required the same to be made before a person authorized by law to take oaths.

POINT VII

SECTION 30-1-2(5) UTAH CODE 1953 IS UNCONSTITUTIONAL AND VOID.

U. S. Constitution Amendments 1, 5 and 14,

Utah Constitution, Article I, Sections 1, 4, 7, 24 and 27,

Parez vs. *Lippold*, 198 P. 2d 17,

Oyamma vs. *O'Neill*, Case No. 61269, S. Ct. Pima Co., Arizona.

The court held that the marriage of the appellants was unlawful, prohibited and void for violation of the provisions of Section 30-1-2 (5) U. C. A. 1953 (R. 165).

We refer the court to Appellants' memorandums R 42 and 133 which are made a part hereof by reference.

We pointed out there and repeat here that under the Equal Protection clauses of both Federal and State Constitutions a State is required to grant all citizens the equal protection of the law. Assuming, but not admitting, that the State Legislature may, for the best interest, welfare and protection of its citizens, prohibit inter-racial marriages—Query: May the Legislature in the face of the above cited constitutional prohibitions, legislate to protect the purity of one race alone? If public welfare requires keeping the white race pure, why doesn't public welfare require keeping all other races pure?

The Court will observe that the provisions of Section 30-1-2 (5) and (6) only prohibits inter-marriage between the races therein named with white persons, but it does not prohibit inter-marriage between those other races with each other, and for this reason alone that statute is repugnant to the Equal Protection clauses of both Federal and State Constitutions.

CONCLUSION

In our opening statement we called the court's attention to the magnitude of the record in this case, most of which was irrelevant and immaterial, and calculated to cloud, camouflage and confuse the real issue.

For instance, the respondent claimed that appellants were insane, sick, unfit persons to have the custody of their child and the best interest of the child required that it be taken from them and placed for adoption, but the trial court would not be misled by such subterfuge (R. 226, pages 144, 145).

Respondent also contended that the marriage of appellants was void for two reasons: (1) because James had a former wife from whom he was not divorced; and (2) because marriages between whites and negroes are forbidden by statute.

The first of these two contentions was wholly irrelevant in that Utah statutes legitimates such children and secondly the statute relied on is unconstitutional and void, and in this the trial court was led into error.

We have shown in this brief the status of a child born under the circumstances revealed by the facts in this case, that is, that the parents of such child are entitled to its custody until deprived thereof by the processes provided by law; that the father of such child is entitled to its custody, subject only to the first right of the mother, even if such child is determined to be illegitimate. We have shown that under the circumstances of this case, the child is legitimate and this court has said that an innocent child should not be bastardized because of the sins of its parents.

We contended in the trial court, and we contend here, that the miscegenation statute is not applicable because the marriage did not take place in Utah, but the respondent insisted upon injecting that issue into this case and the court accepted the issue and held the statute to be constitutional, and valid.

We have pointed out how the mother was coerced into giving the child away, and the invalidity of the statute under which she did so.

Say what one may, the real and only germane issue presented by the record in this case is the race issue, and the application of the principles of Democracy as defined by our founding fathers, in the resolutions of that issue. The founding fathers said:

> "We hold these truths to be self evident—that all men are created equal, that they are endowed by their Creator with certain inalienable rights—that among these are, life, liberty and the pursuit of happiness."

Our forefathers fought a bloody Civil war to preserve those principles. This nation joined the conflagration of World War II to help conquer a "master race" in Germany; and incidentally, the appellant, James, served in that war. Today the free peoples of the world are still watching and waiting to see if a nation so conceived, can endure.

One sure way to preserve that nation is to practice the lesson taught on the Mount, where it was said:

> "Not everyone that saith unto me, Lord, Lord, shall enter the Kingdom of Heaven, but he that doeth the will of my Father which is in Heaven."

And to this end we respectfully submit that, the law should protect the appellants in their right to the custody of their child the same as if they were both of the same racial origin and in this we submit that the judgment should be reversed and remanded with costs to appellants.

Respectfully submitted,

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